Supreme Court, U. S.
FILED
DEC 10 1976
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-674**

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner,*

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

## BRIEF FOR RESPONDENTS IN OPPOSITION

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
*Counsel for Respondents*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

## INDEX


Question Presented ..... 1
Statutes Involved ..... 1
Statement ..... 3
Argument ..... 5
Conclusion ..... 10


## Authorities Cited

### Statutes


*Tennessee Code Annotated* 23-2401—23-2404 ..... 2, 9
12 U.S.C. §91 (1970) .....1, 2, 5, 6, 7, 9, 10


### Table of Cases


*Bachman* v. *First Mechanics National Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J., 1947) ..... 5
*Drewes and Co.* v. *Ham and Seymour*, 103 So. 241 (La., 1925) ..... 8, 9
*Earle* v. *Pennsylvania, et al.*, 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900) ..... 8
*First National Bank* v. *Colby*, 21 Wall. 609, 22 L.Ed. 687 (1874) ..... 6
*Loew's Inc.* v. *Superior Court*, 301 P. 2d 64 (Cal. App., 1956) ..... 6
*Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888) .....6, 7, 8
*Prentiss* v. *Chandler*, 85 F. 2d 733 (Cal., 1936) ..... 6
*Rooney* v. *First Wisconsin National Bank*, 332 F. Supp. 108 (1971) ..... 5
*State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County et al.*, 128 Wash. 100, 222 P. 203 (1924) ..... 9
*Uhl* v. *First National Bank and Trust Co. of Kalamazoo*, 24 F. Supp. 275 (Mich., 1935) ..... 6

# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

**No. 76-674**

---

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner*,

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER
and JAMES K. WALL, *Respondents*.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF TENNESSEE

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

---

## QUESTION PRESENTED

Whether a section of the National Bank Act, 12 U.S.C. §91 (1970) prohibits a state court from issuing an injunction against a national bank prior to a final judgment, temporarily restraining it from foreclosing upon collateral?

## STATUTES INVOLVED

Petitioner cites 12 U.S.C. §91 (1970) as the statute involved, being that statute headed "Transfers by bank and other acts in contemplation of insolvency."

In addition to Section 91 of the National Banking Act, this case involves the Tennessee statute, "Sale Under Trust Deeds and Mortgages." *Tennessee Code Annotated* 23-2401—23-2404, which provides in pertinent part:

> T.C.A. 23-2401 (1873, mod. 1950). Notice of Application to enjoin sale.
>
> No judge or chancellor shall grant an injunction to stay the sale of real estate conveyed by deed of trust or mortgage, with a power of sale, executed to secure the payment of a loan of money, unless complainant gives five (5) days' notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom said application for injunction is to be made. . ."
>
> T.C.A. 23-2403 (1873, mod. 1932) . . . After the reading of the bill in the hearing of the trustee or mortgagee, if he chooses to appear before the judge or chancellor, the said trustee or mortgagee may have the right to a delay of proceedings not more than ten (10) days, during which time he may file his answer before the same judge or chancellor.
>
> T.C.A. 23-2404 (1873, mod. 1932) Decree—The judge or chancellor may then, upon such bill and answer, hear said cause, at chambers, as upon motion to dissolve the injunction, his decision to be in a written decree, which decree, together with the bill, answer and exhibits, shall be enclosed in a sealed envelope, to the clerk of the court in which the bill is filed, said decree to constitute a part of the record in the cause, in conformity, to the terms of which, said clerk may take bonds from either party, or execute any other order as adjudged in said decree.



## STATEMENT

Respondents disagree with certain portions of Petitioner's statement of the case, and further state that, as the question before this Honorable Court involves an interlocutory appeal only, rather than an appeal from a full hearing on the merits, the facts going to the merits are, for the most part, irrelevant. Nevertheless, respondents state the case as follows:

1. Petitioner is a national banking association with its principal place of business, along with numerous branches, located in Nashville, Davidson County, Tennessee.
2. In May, 1973, Petitioner made a "permanent-construction" loan (a construction loan, which at time of completion, would simply be converted into a permanent loan) to Respondents evidenced by a $700,000.00 note which is secured by a deed of trust encumbering the property, an office building.
3. On or about the same date, Petitioner, the Respondents and First and Mid-South Mortgage Company entered into a tri-party agreement whereby First and Mid-South agreed to purchase the note and security instrument from Petitioner at completion of the construction.
4. At the time scheduled for closing in the summer of 1975, First and Mid-South refused to purchase the note from Petitioner as it had agreed, and, as its excuse, stated that certain conditions had not been met.
5. Petitioner did not pursue its remedy against First and Mid-South for breach of the tri-party agree-

ment, but declared the note in default and proceeded to foreclose the property under its deed of trust. The principal balance due was $700,000.00, and the property was NOW valued in excess of $1,000,000.00.

6. On September 26, 1975, Respondents filed a complaint in the Chancery Court of Davidson County, Tennessee, seeking to temporarily restrain Petitioner from foreclosure pending a full hearing on the merits, and in that complaint, set forth the grounds upon which the injunction was sought. A restraining order was not issued *ex parte* as stated in Petitioner's brief, but Petitioner was required to appear and show cause why a temporary injunction should not issue.

7. At the show cause hearing October 8, 1975, the chancellor found, upon the pleading, exhibits filed by Respondents, and extensive argument of counsel, that Respondents had shown the existence of issues which should be determined upon a full hearing on the merits, and that Respondents would suffer irreparable harm if the foreclosure occurred prior to such full hearing. (See Appendix B of Petition for Certiorari at pages A10-A11)

8. A few days thereafter, Petitioner moved the Court to dissolve the injunction charging that under 12 U.S.C. §91, the court did not have jurisdiction to grant a temporary injunction prohibiting the foreclosure of property in which the bank has a security interest. The Chancellor found in favor of the Petitioner's position and entered an order on January 8, 1976, dissolving the injunction, but granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee.



(See Petition for Certiorari, Appendix C, at pages A15-A16)

9. The Supreme Court of Tennessee held that Section 91 of the National Banking Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing collateral and reversed the Chancellor's order. One of the justices did not participate in the majority opinion and one dissented. The Supreme Court of Tennessee, in its opinion, also found that "the United States District Courts in this State would have no jurisdiction to entertain this action . . . and that our State courts provide the only forum in which appellant may obtain relief." (See Petition for Certiorari, Appendix A, page A7)

## ARGUMENT

Petitioner, in its Writ of Certiorari, maintains that a state court is prohibited by 12 U.S.C.A. §91 from issuing an interlocutory injunction against a national bank under any circumstances. Petitioner, in effect, argues that whatever wrongdoing a bank may commit, and whatever degree of culpability is involved in foreclosing property in which it has a security interest, and whatever irreparable damage is caused that bank's customer by that foreclosure, the state courts are powerless and cannot act.

It should be stated here that the United States District Courts in Tennessee do not have jurisdiction to entertain the action involved in this cause (*Bachman* v. *First Mechanics National Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J., 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F. Supp. 108 (1971)). Thereby, under Petitioner's interpretation of 12 U.S.C.A. §91, those customers who are

irreparably injured by wrongful foreclosure are literally without remedy.

12 U.S.C.A. §91 is clearly, by its own terms, a statute providing regulations in regard to transfers by banks and other acts *in contemplation of insolvency.* That is the *plain meaning* of the statute. Its purpose is to guard against wrongful or preferential disposition of assets of banks known to be or about to become insolvent, and to secure equality of distribution of the assets of an insolvent bank among its creditors. *Prentiss* v. *Chandler,* 85 F. 2d 733 (Cal., 1936); *Uhl* v. *First National Bank and Trust Co. of Kalamazoo,* 24 F. Supp. 275 (Mich., 1935); *First National Bank* v. *Colby,* 21 Wall. 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court,* 301 P. 2d 64 (Cal. App., 1956).

It is an uncontroverted fact that Petitioner is neither insolvent nor contemplating insolvency. Nevertheless, Petitioner argues that the case of *Pacific National Bank of Boston* v. *Mixter,* 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888) removes altogether the remedy of injunction against a national bank under any circumstances, without regard to insolvency or contemplation of insolvency.

The issue, then, narrows itself to whether the *Mixter* case extended the plain language of 12 U.S.C.A. §91 to bar temporary injunctions by state courts, pending a final hearing, against a national bank in literally *any* case. It then becomes necessary to examine the facts of the *Mixter* case.

The bank owed Mixter Fifteen Thousand Dollars. Mixter began a suit by attachment to try to recover the monies due him. There were, at the same time, other creditors of the bank who were attempting to attach. While the bank was not *insolvent,* it was having difficulties with



creditors, and the bank would clearly be injured if an attachment issued prior to final judgment. Thus, we are brought to the finding of the court that the bank did not have to be actually insolvent or contemplating insolvency for Section 91 to apply, and the language that "The remedy is taken away altogether and cannot be used under any circumstances." *Mixter, supra,* p. 727. This case, however, dealt with the bank's *creditors,* and not its *debtors,* as is true in the case at hand.

While the *Mixter* case did interpret the statute to apply to dealings with creditors in cases where the banks are not yet insolvent or contemplating insolvency, it *did not* extend the case beyond its intent—to guard against preferential or wrongful disposition of banks by its *creditors.* Petitioner has a mortgage division, dealing in literally millions of dollars worth of home loans annually, those loans secured by the borrower's homeplace. In addition, of course, it makes loans for construction of commercial buildings, whereby after the borrower has constructed the building, its value far exceeds the amount owing on the construction loan, as is true in the case at hand. To extend Section 91 to disallow state courts to grant injunctions against banks in controversies which arise out of their everyday dealings with their debtors is to stretch the meaning of the statute beyond all bounds of reason and give to the banks a power over their adversaries as yet unheard of in our courts.

The Tennessee Supreme Court was of the opinion that the broad language of the court in the *Mixter* case is limited to the facts of the case in which it was spoken, and in its opinion, looked to the purpose of the statute itself.

Petitioner's theory as set forth in the Writ of Certiorari literally *adds to* the statute in question and ex-

tends it far beyond the scope of its plain meaning—to guard against wrongful or preferential disposition of the bank's assets. Petitioner holds forth that the *Mixter* case establishes that the remedies of attachment, injunction and execution are taken away from the state courts altogether, and under any circumstances. Yet, the remedy of attachment by garnishment was upheld by the United States Supreme Court in *Earle* v. *Pennsylvania, et al.*, 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900), in which Justice Harlan, writing for the court, said:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of its assets by the Comptroller; and the words in §5242, 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof,' with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of §5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others." 178 U.S. at 453, 454.

In the case of *Drewes and Co.* v. *Ham and Seymour*, 103 So. 241 (La., 1925), the court dealt extensively with



the question as to whether, in light of 12 U.S.C.A. §91, a state court could issue a preliminary and ancillary injunction to restrain a national bank from paying a draft. In an indepth study of Section 91 and in looking at numerous cases applying thereto, as recited in the court's opinion, the court found those cases applying Section 91 to be cases in which the suit and main demand was against the bank as the debtor or obligee (*Drewes*, p. 244). The court found that the injunction in that case was proper.

Again, the obvious intent of Section 91 is to preserve and safeguard assets of the bank against wrongful disposition, pending a final hearing—it was not intended to give the national banks a license to themselves wrongfully dispose of assets of their debtors pending a final hearing.

Petitioner has chosen to engage on a large scale basis in mortgage financing of homes and other improvements, thereby bringing into play Tennessee law relating to deeds of trust. Guidelines for public foreclosure sales under trust deeds and the injunctions of such sales are established under *Tennessee Code Annotated* 23-2401—23-2404, "Sale Under Trust Deeds and Mortgages." Petitioner seeks to rely on Tennessee law on the one hand, but on the other, asserts that appellant cannot invoke the protection against unlawful foreclosures provided a mortgagee by the above statutes. Petitioner should not be permitted to use to its advantage the portion of law favorable to it, but assert that it is outside the court's reach as to that portion not favorable to it. The Tennessee Supreme Court recognized the dangers inherent by a mortgage banker being placed in such a position, as did the court in *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County et al.*, 128 Wash. 100, 222 P. 203 (1924), wherein the bank sought to foreclose a chattel mortgage and was proceeding with foreclosure when the

mortgagor sought a temporary injunction, alleging a credit due him against the note securing the chattel mortgage. The bank asserted 12 U.S.C.A. §91 as a defense. The court stated in response:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it." p. 205.

## CONCLUSION

For the reasons stated above, Respondents say that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
*Counsel for Respondents*